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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

LAMARR D. DEAN,

Defendant and Appellant.

B290348

(Los Angeles County
Super. Ct. No. KA105038)

APPEAL from a judgment of the Superior Court of Los Angeles County, Juan Carlos Dominguez, Judge. Affirmed; remanded with directions.

Patricia S. Lai, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

Lamarr Dean appeals from a judgment entered following a May 23, 2018 resentencing hearing. He contends he is entitled to another sentencing hearing in light of Senate Bill No. 1393,¹ which amended Penal Code sections 667 and 1385,² effective January 1, 2019, to give trial courts discretion to strike prior serious felony enhancements. For the reasons explained below, we remand the matter for the trial court to determine whether to strike the enhancement under section 667, and if the enhancement is stricken, to reduce the sentence accordingly.

BACKGROUND³

Verdicts and True Findings on Prior Conviction Allegations

On August 1, 2014, a jury found Dean guilty of first degree residential burglary (§ 459), petty theft (§ 484, subd. (a)), and evading a police officer in willful disregard for safety (Veh. Code, § 2800.2, subd. (a)). The jury also found he committed the burglary and evading offenses for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members, within the meaning of section 186.22, subdivision (b)(1)(B).

¹ Senate Bill No. 1393 (2017–2018 Reg. Sess.) Statutes 2018, chapter 1013, sections 1-2.

² Statutory references are to the Penal Code unless otherwise indicated.

³ We take some of the background facts from the appellate record in a prior appeal in this case, case No. B258927. We grant Dean’s February 13, 2019 request that we take judicial notice of the record in case No. B258927.

Dean waived his right to a jury trial on prior conviction allegations set forth in the information. The trial court found true the allegations that he had sustained a prior strike conviction within the meaning of the “Three Strikes” law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), a prior serious felony conviction within the meaning of section 667, subdivision (a)(1), and had served two prior prison terms within the meaning of section 667.5, subdivision (b).

Initial Sentencing Hearing

On September 4, 2014, the trial court held the initial sentencing hearing in this matter. At the outset, the court heard and denied Dean’s motion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. Dean argued the court should dismiss his prior strike conviction for first degree burglary because he was a “youthful” 24-year-old man, who committed the prior strike when he was 21 years old. In denying the motion, the court stated:

“It is always difficult for the court to have a young man of 24 years of age with a potentially bright future ahead of him before the court under these circumstances, but the evidence is quite clear in this case that Mr. Dean is heavily involved in the gang culture; he is heavily devoted to the gang way of life.

“He was released not even a year from state prison from committing the same offense. He is obviously bringing up a new recruit, [the codefendant], in showing him the ropes and put the public at substantial risk after the burglary that was part of this case and then the pursuit that ensued.

“So I do believe that, although he is very young, that Mr. Dean does fall within the spirit of the Three Strikes law and the court will not grant the *Romero* motion.”

Before pronouncing sentence, the trial court commented it found “the circumstances in mitigation and aggravation are substantially balanced in this case.” The court sentenced Dean to 18 years in prison: the middle term of four years for the burglary, doubled to eight years under the Three Strikes law, plus a consecutive five-year term for the gang enhancement, and a consecutive five-year term for the prior serious felony enhancement (§ 667, subd. (a)(1)). The court imposed and stayed a one-year term for each of the two prior prison terms (§ 667.5, subd. (b)). For the offense of evading a police officer, the court sentenced Dean to a concurrent term of nine years: the middle term of two years for the offense, doubled to four years under the Three Strikes law, plus a consecutive five-year term for the gang enhancement. For the petty theft, the court sentenced Dean to a concurrent term of six months in county jail.

Resentencing Hearing

Dean appealed the judgment. We affirmed the convictions and remanded the matter for correction of sentencing errors and for resentencing on grounds not germane to this appeal. Specifically, we ordered the trial court “(1) to strike the gang enhancement under section 186.22, subdivision (b)(1)(B), on count 2 for evading a police officer with willful disregard for safety; (2) to impose the gang enhancement under section 186.22, subdivision (b)(1)(A), on count 2 for evading a police officer with willful disregard for safety and to sentence Dean for that enhancement, (3) to impose or strike the one-year prior prison term (§ 667.5, subd. (b)) for case number BA368316, (4) to stay the sentence imposed on count 4 for petty theft, and (5) to correct his presentence custody credits to reflect 177 days of actual presentence custody credit, and 176 days of local conduct credit,

for a total of 353 days of presentence credit.” (*People v. Dean* (Nov. 30, 2017, B258927) [nonpub. opn.], p. 30.)

On May 23, 2018, the trial court resentenced Dean, again imposing an 18-year prison term on the burglary count. The court corrected the errors as ordered, imposed the middle term of three years for the gang enhancement under section 186.22, subdivision (b)(1)(A) on count 2 for evading a police officer with willful disregard for safety, and struck the one-year prior prison term for case number BA368316. The remainder of the new sentence was identical to the original, including imposition of a consecutive five-year term for the prior serious felony enhancement under section 667, subdivision (a)(1) on the burglary count.

DISCUSSION

On September 30, 2018, the Governor signed Senate Bill No. 1393 which, effective January 1, 2019, amends sections 667, subdivision (a) and 1385, subdivision (b) to give trial courts discretion to strike or dismiss prior serious felony enhancements. (Stats. 2018, ch. 1013, §§ 1-2.) Dean argues, the Attorney General concedes, and we agree the new legislation applies retroactively in Dean’s case because the judgment of Dean’s conviction was not final as of January 1, 2019, the effective date of Senate Bill No. 1393. (*People v. Garcia* (2018) 28 Cal.App.4th 961, 971-972.)

Dean contends the amendment requires the trial court in his case be given an opportunity to exercise its new discretion to strike the five-year prior serious felony enhancement imposed as part of his sentence. The Attorney General argues “remand is unwarranted because the trial court’s statements prior to [Dean’s] original sentencing hearing clearly indicate that it would

not have dismissed the enhancement[] even if it had the power to do so.”

“‘[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to “sentencing decisions made in the exercise of the ‘informed discretion’ of the sentencing court,” and a court that is unaware of its discretionary authority cannot exercise its informed discretion.’ [Citation.] But if “the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required.” ’” (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.)

In *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896, the trial court increased the defendant’s sentence beyond what it believed the Three Strikes law required, by imposing the high term and two additional discretionary one-year enhancements. The court stated during sentencing that imposing the maximum sentence would be appropriate. (*Ibid.*) On appeal, the defendant requested that his case be remanded to the trial court for resentencing after our Supreme Court decided in *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th 497 that a trial court has discretion to strike prior strikes in determining a defendant’s sentence. The appellate court denied the request, noting that because the trial court had indicated both in its comments and by the sentence itself that a maximum sentence was appropriate, “no purpose would be served” by a remand. (*Gutierrez*, at p. 1896.) During the initial sentencing hearing in *Gutierrez*, the

trial court stated, “ ‘this is the kind of individual the law was intended to keep off the street as long as possible,’ ” and indicated it would not have exercised its discretion to lessen the sentence. (*Ibid.*)

A “remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken” the enhancement. (*People v. McDaniels, supra*, 22 Cal.App.5th at p. 425.)

At the time of Dean’s sentencing, the trial court had no discretion to strike the prior serious felony enhancement and did not indicate how it would exercise such discretion if available. Notwithstanding that, the Attorney General argues remand is not necessary, arguing: “Given that the trial court determined that it was not in the interest of justice to lessen [Dean]’s sentence by four years [by granting his *Romero* motion and dismissing his prior strike conviction], it is inconceivable that the trial court would have believed those same interests would have supported the act of striking [Dean]’s five-year prior serious felony conviction enhancement.” We disagree with the Attorney General’s argument. The fact the trial court found Dean within the spirit of the Three Strikes law does not necessarily mean the court would have declined to strike the enhancement if, at the time of the hearing, sections 667 and 1385 afforded the court such discretion.

Moreover, because the law at the time of sentencing did not allow the trial court to strike prior serious felony enhancements, Dean had no reason to argue the court should strike his enhancement. As our Supreme Court explained in a somewhat similar circumstance in *People v. Rodriguez* (1998) 17 Cal.4th

253, 258, “The evidence and arguments that might be presented on remand cannot justly be considered ‘superfluous,’ because defendant and his counsel have never enjoyed a full and fair opportunity to marshal and present the case supporting a favorable exercise of discretion.” (*Ibid.* [requiring the presence of defendant and counsel at a hearing in which the court would determine whether it could reasonably exercise its discretion to strike a prior strike].)

For these reasons, we remand the matter for the trial court to determine whether to strike the prior serious felony enhancement. If the court strikes the enhancement, it must reduce Dean’s sentence accordingly.

DISPOSITION

The convictions are affirmed. Upon remand, the trial court shall determine whether to strike the enhancement imposed under section 667, subdivision (a)(1). If the court strikes the enhancement, the court shall reduce the sentence accordingly, amend the abstract of judgment, and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

CHANNEY, J.

We concur:

ROTHSCHILD, P. J.

WEINGART, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.